95-953

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

– vs. –

CITY OF NEW YORK, RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DIMARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY, and PARAGON CABLE MANHATTAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the order of a state administrative agency constituting a prior restraint on First Amendment speech is ripe for judicial review.

PARTIES TO THE PROCEEDING

The petitioner to this proceeding is Liberty Cable Company, Inc., which was a plaintiff-appellant in the courts below.

The named respondents in this proceeding are the City of New York, Ralph A. Balzano, the New York State Commission on Cable Television, William B. Finneran, Gerard D. DiMarco, Barbara T. Rochman, David F. Wilbur and John Passidomo -- who were defendants-appellees in the courts below -- and the United States of America, Time Warner Cable of New York City and Paragon Cable Manhattan, who were intervenors-defendants-appellees in the courts below.

Respondents unnamed in the caption are Sixty Sutton Corp. and Jack A. Veerman, both of whom were plaintiffs-appellants in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Liberty Cable Company, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App., *infra*, A-1-7) is reported at 60 F.3d 961.

The opinion of the United States District Court for the Southern District of New York (App., *infra*, A-23-74) is reported at 893 F. Supp. 191.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1995. App., *infra*, A-21-22. A petition for rehearing with suggestion for rehearing *en banc* was denied on September 18, 1995. App., *infra*, A-20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent sections of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 522(5), (6) and (7) and 541, are reprinted at App., *infra*, A-173-77. The relevant portions of New York Executive Law, §§ 812, 814 and 815, are reprinted at App., *infra*, A-173-183.

STATEMENT

This case arises out of an administrative injunction issued by respondent New York State Commission on Cable Television ("NYSCC") prohibiting Liberty Cable Company, Inc. ("Liberty"), from engaging in First Amendment speech and press activity. App., *infra*, A-150-53.[1] Despite the immediate and tangible nature of this prior restraint of Liberty's First Amendment rights, the courts below refused to adjudicate Liberty's challenge to the state injunction, dismissing it as unripe. As a result, the Courts below did not reach Liberty's First Amendment challenge to provisions of the Cable Act requiring the State to franchise and otherwise to regulate video programming distribution systems that do not use public property. The issue in this case has a profound effect on the exercise of core constitutional values; the lower courts' holdings, moreover, conflict with: (1) courts of appeals

[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioner Liberty Cable Company, Inc. states that it has no parent or subsidiary companies (other than those that are wholly owned).

decisions and decisions of this Court regarding the ripeness of prior restraints; and (2) courts of appeals decisions and decisions of this Court regarding the ripeness of any administrative enforcement order.

Liberty is an alternative multichannel video programming distributor[2] that serves approximately 25,000 subscribers in the New York City metropolitan area. App., *infra*, A-99-100. Unlike its franchised cable television competitor, respondent Time Warner Cable of New York City ("Time Warner"), Liberty does not utilize public property to distribute video programming. *Id.* at A-103. Rather, it receives satellite and broadcast television signals at several reception facilities and retransmits the signals by microwave to reception antennae located on the roofs of multiple unit dwellings in which residents receive Liberty's video programming service. *Id.* at A-103.

In a limited number of instances, Liberty serves more than one building not under common ownership, operation or management from a single microwave reception antenna by using coaxial cable to link the building that houses the reception antenna to an adjacent building ("Non-Common Systems"). App., *infra*, A-104. The question at the heart of Liberty's challenge is the constitutionality of requiring these Non-Common Systems, which operate entirely on private property, to obtain a franchise before exercising First Amendment rights. The question at the heart of this petition is whether an administrative order enforcing this requirement is ripe for judicial review.

1. *Statutory Background.* On December 9, 1994, NYSCC[3] orally issued an administrative injunction (the

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[2] The term "multichannel video programming distributor" is defined at 47 U.S.C. § 522 (12).

[3] NYSCC was established by N.Y. State Exec. Law § 814. It is vested with the authority, *inter alia*, to regulate cable companies providing service in New York. N.Y. Exec. Law § 811. NYSCC has the specific authority to regulate the municipal franchising process. N.Y. Exec. Law § 815(2)(a). As of January 1, 1996, NYSCC will cease to exist and its powers will be transferred to the New York State Public Service Commission. 1995 New York Laws, Ch. 85.

"Standstill Order" or "administrative injunction") that barred Liberty from providing video programming service to subscribers in new Non-Common Systems unless Liberty first obtained a cable television franchise from respondent City of New York ("City"). The Standstill Order states:

> There will be an immediate standstill; again, requiring no additional cable or closed transmission interconnections of buildings not commonly owned, controlled or managed; that where service is not currently being provided, that no new subscribers be serviced through such hard-wired interconnection absent common ownership, control or management; that such standstill be in effect until vacated by this commission.

App., *infra*, A-150-51. NYSCC issued the Standstill Order pursuant to provisions of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521, *et seq.*, and Article 28 of the New York State Executive Law. Specifically, NYSCC relied upon 47 U.S.C. § 541(b), which provides that "a cable operator may not provide cable service without a franchise," and § 522(7), which defines a "cable system" as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right of way.

(the "Common Ownership Requirement").[4] Despite the fact that they do not use any public property, Liberty's

[4] The term "cable operator" is defined, in pertinent part, as "any person or group of persons (A) who provides cable service over a cable system . . . 47 U.S.C. § 522(5). The term "cable service" means "(A) the one-way

(Footnote continued)

Non-Common Systems are "cable systems" as defined by the Cable Act and are subject to the franchise requirements of the Cable Act. App., *infra,* A-105.

2. *The Absence of a Franchise.* The Common Ownership Requirement was enacted in 1984. A decade later, the City did not have any procedure available to franchise "cable systems" that did not use public property, and there was no indication when or whether such a franchise procedure would be created. App., *infra*, A-107-09. Nevertheless, NYSCC enjoined Liberty from serving new Non-Common Systems until Liberty obtained the unavailable franchise. Thus, as soon as it was issued, the NYSCC injunction restrained Liberty from engaging in protected speech and press activity for an indeterminate period of time.[5]

The administrative injunction is designed to remain in place indefinitely. Its termination is triggered by the occurrence of one of two events: (1) a determination by NYSCC to vacate it; or (2) Liberty's acquisition of a City franchise. The first event will occur only at the whim of NYSCC. The second event -- Liberty's acquisition of a City franchise -- rests entirely in the discretion of New York City. This authority, which is defined in the New York City Charter and City Council Resolution 1639, is not subject to temporal or substantive limitations.[6] App. *infra,* A-139-46; A-184-87.

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transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." 47 U.S.C. § 522 (6).

[5] Despite the uncertainty of whether and when a franchise would be available from the City, NYSCC did not specify any date certain upon which the administrative injunction would terminate. Rather, it stated that "such standstill [will] be in effect until vacated by this commission." App. *infra,* A-151.

[6] On February 24, 1995, more than five months after the issuance of the Standstill Order and a mere five days before the district court hearing on

(Footnote continued)

On November 13, 1995, the City finally issued a Request for Proposal ("RFP") for a cable television franchise for entities not using public property.[7] The RFP necessarily incorporates the terms of Resolution 1639 and requires applicants to submit their proposals and all materials responsive to the RFP by January 31, 1996 (RFP at 3). The City then has until March 1, 1996 to identify the applicants, if any, with whom it will negotiate. *Id.* The City is not obligated to enter into negotiations with any applicant, even if the applicant provides a proposal that meets all of the terms set forth in the RFP. *Id.* at 6. In addition, the City can "postpone or cancel this RFP or [ ] reject any or all proposals at any time." *Id.* at 7.

Even if the New York City Department of Information Technology and Telecommunications ("DOITT"), the City agency responsible for administering the franchise process, ultimately offers Liberty a franchise agreement, that agreement is still subject to the standardless approval of (a) the Franchise and Concession Review Committee -- a City agency; (b) the Mayor of New York City; and (c) NYSCC or its successor. *Id.*

None of these city and state entities are governed by any objective substantive standards upon which they must base their decision. The Committee, the Mayor and NYSCC are not required by any statute or regulation to approve franchise applications that meet all criteria of law and all the terms of the RFP.

3. *Proceedings in District Court.* On December 13, 1994, Liberty filed a First Amended Complaint seeking a declaration and enforcement of its First Amendment rights and its right to due process under the Fifth and Fourteenth

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Liberty's petition for an injunction, the City initiated by Notice a rulemaking proceeding to establish a rule for the issuance of "Off Street Cable Franchises." App., *infra,* A-33. It took the City until November 13, 1995, almost nine months from that date of the Notice, to issue a Request For Proposal, the next step in the franchising process.

[7] A copy of the RFP has been lodged with the Court.

Amendments of the United States Constitution. App., *infra*, A-101; A-112-116. Specifically, Liberty challenged the Common Ownership Requirement facially and as applied to Liberty's Non-Common Systems. The Complaint also alleged that:

> The operation of the Non-Common Systems . . . is a speech activity on private property protected by the First Amendment . . . . Defendants' conduct which, *inter alia*, includes the prohibition of Liberty's operation of the Non-Common Systems without a franchise, and the failure to provide the terms and conditions for the issuance of a franchise to cable systems which do not use public property or rights-of-way, prevents, burdens, violates and interferes with Liberty's rights to engage in protected speech activity on private property in violation of the First Amendment.

App., *infra*, A-113-114. Liberty also claimed that the procedures used by NYSCC and DOITT deprived it of due process pursuant to the Fifth Amendment of the Constitution and was unreasonable pursuant to 47 U.S.C. § 541(a)(1). App., *infra*, A-174.

On December 21, 1994, Liberty, Sixty Sutton Corp. and Jack A. Veerman moved before the United States District Court for the Southern District of New York (Preska, J.) for a preliminary injunction lifting this prior restraint of speech. Respondents NYSCC and Time Warner[8] opposed Liberty's motion and cross-moved to dismiss the complaint on the grounds that, *inter alia*, Liberty's First Amendment claims were not ripe for adjudication. In a March 13, 1995 opinion,[9] the district court granted the motions to dismiss Liberty's

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[8] On February 14, 1995, the district court permitted Time Warner to intervene as a defendant over the objections of Liberty. App., *infra* A-38.

[9] The March 13, 1995 opinion is embodied in an Order entered on March 14, 1995. App., *infra*, A-87.

First Amendment and due process claims on ripeness grounds. App., *infra*, A-29-30. The district court denied the motions to dismiss Liberty's claim that the Common Ownership Requirement violates equal protection; however, the court also denied Liberty's motion for a preliminary injunction as to that claim. *Id.*

In its dismissal of Liberty's First Amendment claims, the district court relied heavily upon the decision of the Court of Appeals for the District of Columbia in *Beach Communications, Inc. v. FCC*, 959 F.2d 975 (D.C. Cir. 1992) ("*Beach I*"), *appeal after remand*, 965 F.2d 1103 (D.C. Cir. 1992) ("*Beach II*"), *rev'd.*, __ U.S. __, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("*Beach III*").[10] App., *infra*, A-43-45. The district court rejected the fundamental distinction between this case, where a state agency actually applied the Cable Act to enjoin Liberty from exercising its First Amendment rights, and *Beach*, where the petitioners asserted a purely facial challenge to the federal statute. Applying the first prong of the test in *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681(1967) ("*Abbott*"), the court reasoned that the issues were not fit for adjudication because (a) Liberty had "not yet applied for a franchise" from the City, App., *infra*, A-44-45; (b) neither NYSCC nor the City had "taken any final action with respect to Liberty," *id.*; (c) Liberty could not "identify what burdens the franchising scheme might impose," *id.*; and (d) without knowing "the precise nature of the burdens imposed, it cannot be said what the appropriate level

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[10] In *Beach I*, the D.C. Circuit dismissed a petition to review the FCC's definitional order interpreting the Common Ownership Requirement on the grounds that, in the absence of any attempt to enforce the franchise requirement on the petitioners, the First Amendment issues raised were not ripe. 959 F.2d at 985. The parties did not request *certiorari* on the issue of the ripeness of the First Amendment claims. However, the Circuit Court ultimately found the statute unconstitutional on equal protection grounds. 965 F.2d at 1106. In reversing the appellate court's equal protection ruling, this Court never opined on the issue of ripeness. *Beach III*, __ U.S. at _____, 113 S.Ct. at 2100, n.3.

of scrutiny might be with which to evaluate plaintiffs' First Amendment challenge." App., *infra*, A-46-47.

Applying the second *Abbott* prong, the district court found that, "it cannot be said on the facts currently in the record that any particular hardship will befall the plaintiffs if judicial decision-making is withheld for now." App., *infra*, A-48. The court did not address the fact that the NYSCC injunction was barring Liberty from engaging in First Amendment expression -- a hardship that the *Beach* petitioners did not face -- although it did make the inapposite statement that Liberty did not risk imminent "serious penalties" because "whether the defendants will exercise their regulatory authority in such a way as to impinge upon the constitutional rights of plaintiffs simply cannot be ascertained as of yet." *Id.*[11] Conversely, the court found that an adjudication of the constitutionality of the Common Ownership Requirement might harm the City and NYSCC by interfering with their proceedings to enforce that provision.[12] App., *infra*, A-53.

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[11] The City Charter, City Council Resolution 1639, Article 28 of the New York Exec. Law and the relevant provisions of the Cable Act defined the set of minimum burdens that would be imposed on any cable franchisee. Liberty demonstrated that the burdens would include (1) the loss of at least 8 channels of its unique programming in order to fulfill the combined federal, state and city programming requirements, *see* 47 U.S.C. §§ 532 and 535, N.Y. Comp. Codes R. & Regs. tit. IX, § 596.10, App., *infra*, A-139-46; A-159; (2) the expenditure of at least $191,000,000 to meet franchise construction costs to provide "universal service" within the four New York City community board districts (the smallest permissible franchise areas) in which Liberty currently operates, App., *infra*, A-163 and (3) the expenditure of at least $625,000 to provide subscribers with self-censoring lock-out devices pursuant to 47 U.S.C. § 544(d)(2). App., *infra*, A-164.

[12] The district court acknowledged that Liberty may have suffered harm when it stated that any harm suffered by Liberty would be of its "own making" because Liberty did not apply for the *non-existent* franchise from the City immediately after the Supreme Court's decision in *Beach* upholding the Common Ownership Requirement under a rational basis-equal protection analysis. App., *infra*, A-49.

2. *Proceedings in the Second Circuit.* The Court of Appeals for the Second Circuit adopted the lower court's opinion. App., *infra,* A-1-7. The Court of Appeals agreed entirely with the district court's ripeness analysis and adopted its reasoning. The Second Circuit's opinion added "a few additional words of clarification" to the district court's due process analysis. App. *infra,* A-5. The Court of Appeals stated that, "[i]n ruling that Liberty's due process claims were not yet ripe for adjudication, the district court stated that 'a procedure is in place through which Liberty can obtain a franchise,'" but the Circuit Court then proceeded to explain that:

> Though this statement is not literally correct, since New York City does not yet have a final procedure for the granting of so-called "off-street" franchises, we understand the District Court to have been referring to the fact that the City is presently creating an off-street franchise procedure through a rulemaking proceeding.

Id. The Court of Appeals went on to find that Liberty's due process rights would be vindicated so long as the City acted with "reasonable dispatch" in issuing off-street franchise procedures and negotiating a franchise with Liberty. App., *infra,* A-6. As authority, the Second Circuit cited *Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and its progeny.

Liberty petitioned for rehearing with suggestion for rehearing *en banc,* arguing, *inter alia*, that the Court of Appeals had erred in applying *Matthews v. Eldridge* in a First Amendment context. Liberty's petition was denied on September 18, 1995. App., *infra*, A-20.

3. *The Standstill Order Remains in Effect.* The administrative injunction, in effect for more than one year, still prevents Liberty from serving subscribers in new Non-Common Systems. The district court continues to maintain that, until the City franchise process has been completed, the litigation will not be ripe. In other words, the keys to the courthouse door are held by the City. Only when it concludes its

franchise proceedings will any of Liberty's First Amendment claims be reviewed by the district court. Thus, Liberty's challenge to the Standstill Order as a prior restraint, its challenge to the standardless City franchise procedures and its challenge to NYSCC's ruling that it must seek a franchise, remain indefinitely postponed until Liberty is denied the franchise it does not believe it must legally seek.

REASONS FOR GRANTING THE PETITION

The lower-court decisions are a dangerous anomaly in First Amendment jurisprudence. Neither precedent nor principle supports the proposition that a state injunction restraining speech does not present an Article III case or controversy. There is certainly no precedent or principle that a prior restraint of speech, as has existed here since December 1994, is not ripe for review until a local franchising authority has developed its franchise criteria and has denied a franchise.

If the decisions below are not reversed, Second Circuit courts will remain closed to First Amendment speakers whose rights unquestionably have been trampled but where the damage inflicted has not yet been determined. This is a *Through-The-Looking-Glass* perversion of First Amendment jurisprudence, which consistently has advanced the principle that the appropriate time for a federal court to intervene to review a state-issued prior restraint of speech is *no later* than the moment that the state action impairs speech. Any other rule would condone the indefinite delays in federal judicial consideration of state burdens on speech that Liberty has experienced here. This result should not be countenanced.

The courts below badly confused the law of ripeness. Unless clarified, these decisions will import into judicial review of enforced administrative orders notions of ripeness that heretofore have been limited to pre-enforcement review. The decisions below are an unprecedented departure from the presumption that every agency enforcement action is reviewable. They create the spectre of virtually unbridled administrative enforcement power untempered by the immediate availability of judicial review.

NYSCC issued its order in reliance upon provisions of the Cable Act that Liberty maintains violate the First Amendment by regulating speech that occurs exclusively on private property. The constitutionality of the statutory provisions challenged by Liberty is an issue vital to the development of the communications industry. The resolution of this challenge will directly affect the growth of competition in an industry that both Congress and the Federal Communications Commission ("FCC") have determined is already highly concentrated and prone to monopolization. Resolution of this challenge will also affect the programming choices available to consumers. App., *infra*, A-159-62. This Court recognized the importance of the question of whether Non-Common Systems not using public rights of way can be regulated under the Constitution by granting *certiorari* in *Beach*.

If cable companies or other First Amendment actors are subject to prior restraints of speech, the statutory underpinnings of these restraints must be reviewable immediately. Liberty seeks reversal of the lower courts' dismissal of its First Amendment claims on ripeness grounds so that Liberty's challenge to the administrative injunction and, consequently, to the statutes that the injunction enforces, can be adjudicated.

1. *Judicial Review Must Be Immediately Available to Challenge a Prior Restraint.* If permitted to stand, Second Circuit law will render state administrative injunctions that constitute prior restraints on the exercise of First Amendment rights immune from immediate judicial review.[13] By denying Liberty the opportunity to be heard on the merits of its First Amendment challenge, the Second Circuit has slammed the door on speakers alleging that a prior restraint burdens a core

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[13] The administrative injunction is a prior restraint of speech. The term "prior restraint" describes "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. U.S.*, ___ U.S. ____, 113 S.Ct. 2766, 2771, 125 L.Ed.2d 441 (1993), *quoting* M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, at 4-14 (1984) (emphasis added).

constitutional right. This precedent is even more remarkable because there is no case where a First Amendment prior restraint has been found unripe. Prior restraints "come[ ] to this Court bearing a heavy presumption against [their] constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963), and they can be upheld only rarely and then *only* because of the immediacy of judicial review.[14]

The threshold issue necessary to satisfy any court that a prior restraint of speech can survive judicial scrutiny has been the availability of immediate judicial review.[15] "[A]ny restraint

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[14] The articulated preference for judicial review only after any alleged illegal First Amendment activity, as opposed to restraint beforehand, has led this Court and the Circuit Courts of Appeals routinely to strike down prior restraints as violative of the First Amendment. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed 1357 (1931); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). As Justice Blackmun said in *CBS, Inc. v. Davis*, _____ U.S. _____, 114 S.Ct. 912, 914, 127 L.Ed.2d 358 (1994), only in the most exceptional circumstances, where "the evil that would result . . . is both great and certain and cannot be militated by less intrusive measures" have prior restraints been upheld.

The duration of the administrative injunction depends entirely on the exercise of standardless administrative discretion by state and municipal agencies. *See* discussion at 5-6, *supra*. As such, the administrative injunction is paradigmatic of the type of licensing requirement that has been held to be an impermissible prior restraint of First Amendment activity. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 1576, 29 L.Ed.2d 1 (1971) (an order "enjoining petitioners from distributing leaflets anywhere in the town of. . . ." was an impermissible prior restraint); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413 (1980) (an order "restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed" amounted to an unconstitutional prior restraint).

[15] "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FCC*, __ U.S. __, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994); *see also Leathers*

(Footnote continued)

imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo *for the shortest fixed period compatible with sound judicial resolution.*" *Freedman v. State of Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965) (emphasis added). Absent the safeguards created by prompt judicial review, no prior restraint has, heretofore, been able to survive judicial scrutiny.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229, 110 S.Ct. 596, 603-06, 107 L.Ed.2d 603 (1990), this Court evaluated a statute that vested in a municipality the authority to grant or deny licenses necessary to the operation of adult-oriented businesses. The Court found that:

> the Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity . . . .

Id. at 606. Liberty's position is analogous to that of *FW/PBS*. NYSCC exercised its substantively and temporally boundless discretion to restrain speech. Yet, the Second Circuit created a new rule of law finding Liberty's challenge not even

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v. Medlock, 499 U.S. 439, 444, 111 S.Ct. 1438, 1442, 113 L.Ed.2d 494 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986). Consequently, any government regulation that burdens the speech activity of a video programming distributor, such as Liberty, is subject to a heightened level of judicial scrutiny, particularly where, as here, the regulation imposes a prior restraint on the speaker. *See, e.g., Turner*, __ U.S. at __, 114 S.Ct. at 2460-61 (finding that an intermediate level of scrutiny applied to the must-carry provisions of the Cable Act).

justiciable -- directly contrary to the holding in *FW/PBS*. *See also National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (holding that "[i]f a State seeks to impose a restraint [on the First Amendment], it must provide strict procedural safeguards, including immediate appellate review. . ."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155, 89 S.Ct. 935, 941, n.4, 22 L.Ed.2d 162 (1969) (same).

The notion that a state agency's injunction against First Amendment activity -- an action even more debilitating to First Amendment rights than the failure to grant a license -- would be deemed unreviewable on ripeness grounds cannot be reconciled with *Freedman*, *FW/PBS* and *National Socialist Party of America*. Yet, the prevailing rule in the Second Circuit now holds that an administrative injunction on First Amendment activity burdening a specific actor and preventing that actor from airing specific First Amendment speech, is not ripe for review unless a subsequent condition -- completion of the licensing process -- is met.

2. *The Second Circuit's Decision Creates A Conflict Among The Circuits.* It is not surprising that the Second Circuit's new position on ripeness also conflicts directly with the standards articulated in other Circuits. A recent opinion dramatizes the magnitude of the Second Circuit's departure from the norm. In *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995), the Tenth Circuit began its analysis by stressing that, in the First Amendment context, the ordinary ripeness rules were relaxed to insure that unnecessary burdens did not chill First Amendment rights. The Circuit Court noted that, in the First Amendment context, the reasonable predictability of an enforcement action or threats of enforcement, without more, were sufficient to create ripeness. *Id.* at 1499, *citing Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298-99, 99 S.Ct. 2301, 2308-09, 60 L.Ed.2d 895 (1979); *Martin Tractor Co. v. Federal Election Commission*, 627 F.2d 375, 380 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 954, 101 S.Ct. 360, 66 L.Ed.2d 218 (1980). In fact, in *Richardson*, *supra*, the Tenth Circuit found ripe a

facial challenge to New Mexico's election laws where there was no enforcement action and no indication that any governmental entity intended to take action against Richardson.

The concern that forbidding challenges to statutes and administrative actions that burden First Amendment rights would itself chill speech pervades the cases adjudicating the ripeness of First Amendment litigation. The standard defined by the courts below becomes more perverse when viewed in the context of the deference by courts -- in the form of more relaxed ripeness standards -- that is usually paid to actions alleging a burden on the First Amendment. *See, e.g., American Arab Anti-Discrimination Committee v. Reno*, ___ F. 3d. ___, 1995 WL 654094 at 10 (9th Cir. 1995). ("As noted earlier, injury to First Amendment rights more readily justifies a finding of ripeness due to the chilling effect on protected expression which delay might produce"); *Cheffer v. Reno*, 55 F.3d 1517, 1523, n.12 (11th Cir. 1995) (noting that "ripeness is more loosely applied in a First Amendment context"). If this Court permits the lower-court opinions to stand, a conflict will have emerged among the circuits.

3. *Challenges to Procedures Restraining First Amendment Rights Must Be Adjudicated Promptly.* One particularly dangerous consequence of the Second Circuit's rule is that it postpones review of allegedly unconstitutional administrative procedures restraining First Amendment rights. Liberty argued below that it should not be barred from serving new Non-Common Systems while the City promulgates franchise procedures and negotiates a franchise with Liberty -- a franchise that Liberty argues is unconstitutional. The prior restraint of Liberty's speech has been in place for over a year, with no end in sight.

The Second Circuit held that, as long as the City acts with "reasonable dispatch," judicial review is not available. The District of Columbia Circuit contemporaneously took a position contrary to the Second Circuit's position in this case. In *South Fork Broadcasting Corp. v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), the FCC argued that a monetary forfeiture against

a broadcaster of indecent material was not ripe for review because further administrative proceedings were available and because the broadcaster would have the opportunity to challenge the procedures when the government attempted to collect the forfeiture. The Court of Appeals gave short shrift to the FCC's argument, pointing to the obvious flaw: "the broadcaster would have to wait until judicial review is at hand before it could argue that judicial review does not come soon enough." *Id.* at 1258. The Court of Appeals concluded correctly that the "possibility that the agency's actions might . . . run afoul of the first amendment demands prompt judicial scrutiny." *Id.* at 1259, *citing, Columbia Broadcasting System v. United States*, 316 U.S. 407, 425, 62 S.Ct. 1194, 1204, 86 L.Ed. 1563 (1942). The Second Circuit's decision withholds judicial review until after the challenged administrative procedures are completed. The decision eliminates any hope of prompt review.

The need for prompt judicial scrutiny of administrative proceedings restraining First Amendment rights should be inarguable. Government cannot be permitted to infringe free speech, yet have control over the timing of any challenge to that infringement. Yet this is precisely what the Second Circuit did when it denied Liberty judicial review, justifying its postponement of review by relying on the *Matthews v. Eldridge* line of cases. It is error to apply the low level, rational basis test of *Eldridge* in a First Amendment context. The *Eldridge* test governs the due process applicable to statutory entitlements. It does not apply to fundamental constitutional rights. When a due process challenge to a government act curtailing free speech is raised, a high level of scrutiny is called for. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628 (1943).

The Court should take this opportunity to determine whether heightened or strict scrutiny applies in this context. Otherwise, other circuit courts may adopt the Second Circuit's error that "reasonable" administrative delay can bar

review of an administrative order burdening free speech. This should not be the law.

4. *The Courts Below Misapplied the Ripeness Test of Abbott.* Second Circuit law now interprets this Court's decision in *Abbott* in a way that defeats the very purpose of that opinion. *Abbott* was intended to expand the circumstances under which courts could review a rule before enforcement. It was never intended to apply to or to restrict judicial review after the government actually had enforced an order. There is no reported case (save the lower-court opinions in this case) that has held that an administrative injunction actually enforced is unreviewable on ripeness grounds. This Court should clarify its decision in *Abbott* to make clear that an enforced order, such as that presented here, is ripe for review.

In affirming the district court, the Second Circuit lost sight of the intended purpose of *Abbott*. The opinion in *Abbott* created criteria to determine when a rule could be reviewed before enforcement. Prior to *Abbott,* the Court generally had rejected pre-enforcement review or permitted it only in narrow circumstances. *See, e.g., Frozen Food Express v. United States*, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956); *United Public Workers v. Mitchell,* 330 U.S. 75, 89-92, 67 S.Ct. 556, 564-65, 91 L.Ed. 754 (1947); *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299, 309-10, 47 S.Ct. 413, 414, 71 L.Ed. 651 (1927). With the 1967 *Abbott* decision, the Court both regularized the approach to reviewing pre-enforcement claims, and significantly broadened the circumstances under which pre-enforcement review was possible. In discussing *Abbott*, Professor Davis observed that:

> The Court transformed the law of ripeness dramatically in 1967 . . . . Prior to 1967, the court was reluctant to consider the validity of any statute, rule or informal statement of an agency's position *except in the context of a party's attempt to defend its conduct in an enforcement proceeding.*

Davis, K. and Pierce, R., *Administrative Law Treatise*, Sec. 15.12 at 361 (3d Ed. 1994). (emphasis added).

Abbott used the model of the enforcement proceeding to establish criteria to determine the limited circumstances in which pre-enforcement review could be ripe. It distilled the characteristics of enforced orders that necessarily made them ripe for review and applied those characteristics to review of rules yet to be enforced. The concerns enumerated in this Court's oft-quoted explanation of the test it articulated for pre-enforcement review are not present after enforcement occurs. The test prevents the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference *until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Id.* at 148, 87 S.Ct. at 1515 (emphasis added).

While the critical characteristics of finality, hardship and the presence of concrete disagreements are inherent in enforcement proceedings, they are not necessarily present prior to enforcement. Accordingly, the test in *Abbott* is appropriately applied pre-enforcement. *See Reno v. Catholic Social Services, Inc.*, ___ U. S. ___, 113 S.Ct. 2485, 125 L. Ed. 2d 38 (1993); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed. 2d 695 (1990); *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n.*, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 101 S. Ct. 295, 66 L.Ed. 2d 268 (1980); *Gardner v. Toilet Goods Assn.*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967); *Toilet Goods Association v. Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *see also Thunder Basin Coal Co. v. Reich*, ___ U. S. ___, 114 S. Ct. 771, 778, 127 L. Ed. 2d 29 (1994); Davis, *Administrative Law Treatise*, § 15.11 at 159 ("Since 1967, the Supreme Court and the circuit courts have applied the two-part *Abbott* test in hundreds of cases involving this ripeness rule for judicial review *prior to the application of the rules"*) (emphasis added).

When pre-enforcement review of a rule is sought, there is usually an issue as to whether the claim is premature and

whether hardship is present. However, once a rule is enforced, there is absolutely no risk of premature judicial determination; the factual and legal determinations made by the enforcing agency become the foundation for any subsequent judicial decision making. There is no risk of the courts' "entangling themselves in abstract disagreement," *Abbott,* 387 U.S. at 148, 87 S. Ct. at 1515; the disagreements are formed and defined. Nor is there any need to "protect the agencies from judicial interferences until an administrative decision has been formalized," *Abbott,* 387, U.S. at 148, 87 S. Ct. at 1515; the order enforcing the rule is the formal act of the agency. As succinctly stated by the Court in *National Wildlife Federation*, where "a substantive rule . . . as a practical matter requires the plaintiff to adjust his conduct immediately . . . [s]uch agency action is 'ripe' for judicial review at *once* . . ." *National Wildlife Federation*, 110 S.Ct. at 3190 (emphasis added).

In this case, Liberty does not seek pre-enforcement review. Rather, it seeks judicial review following the enforcement of the Common Ownership Requirement by NYSCC. The stated purpose and the actual effect of the Standstill Order is to force Liberty to adjust its conduct as of the date of its issuance. Accordingly, the order was reviewable at *once.*

The danger in applying *Abbott* beyond pre-enforcement review to review of an enforced order is demonstrated in this case. The two-prong test for ripeness set forth in *Abbott* -- that the issues presented must be fit for judicial decision and the party seeking review must demonstrate that it will suffer hardship if court consideration is withheld, *Abbott,* 387 U.S. at 148-149, 87 S.Ct. at 1515 -- should always result in a finding that an enforced order, such as the one at issue here, is ripe for review. That it led to the opposite conclusion here, argues strongly for clarification of *Abbott.*

In evaluating whether a pre-enforcement claim presents a ripe controversy, courts look, *inter alia,* to whether the issues

require further factual development.[16] *Abbott*, 387 U.S. at 149-54, 87 S.Ct. at 1515-18. The district court held that the First Amendment issues in this case would not be ripe for review unless and until the City offered Liberty a franchise. Until then, the court held further factual development was needed to permit the court to consider "what the ultimate mix of [franchise] burdens will be" in order to determine "the appropriate level of scrutiny [ ] to evaluate plaintiffs' First Amendment challenge." App., *infra*, A-46-47.

The district court was plainly wrong. By definition, there *cannot* be a need for factual development to determine ripeness in post-enforcement review cases. The enforcement itself is the controversy sought to be adjudicated. Whether there is a factual basis to support the enforcement is a question for adjudication on the merits. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 1606-07, 84 L.Ed. 2d 643 (1985). A failure of an agency to support its enforcement by facts of record may result in a reversal or a remand, *id.*, but clearly, it cannot result in finding that the enforcement itself is not ripe for review. Accordingly, no further factual development can be needed to establish concreteness after an agency acts.

Similarly, the hardship prong of *Abbott* must, *a fortiori*, be satisfied when applied to an enforced order. The hardship aspect of ripeness is related to the requirement that the effects of the administrative decision be "felt in a concrete way by the challenging parties." *Abbott*, 387 U.S. at 148-49, 87 S.Ct. at 1515. In analyzing the second *Abbott* factor, the district court failed to recognize that an injunction that actually restricts protected First Amendment conduct necessarily constitutes harm sufficient to satisfy *Abbott*.

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[16] Courts also consider whether an agency action is "final." The district court's opinion does not hold that the Standstill Order is not final for ripeness purposes. While the order is interim, it has the immediate effect of enjoining behavior. Under the "flexible view of finality" endorsed by the Court in *Abbott*, the Standstill Order is "final." 387 U.S. at 149-51, 87 S.Ct. at 1516-17.

In *Abbott,* the Court found that a plaintiff who had to choose between compliance with agency regulations and the risk of potential governmental enforcement actions asserted a claim that satisfied the second prong of the ripeness analysis. 387 U.S. at 152-53, 87 S.Ct. at 1517-18. A claim is concrete, *inter alia,* as soon as the impact of a rule can "be said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Toilet Goods Assn.,* 387 U.S. at 164, 87 S.Ct. at 1524. When a regulation is applied in some "acute fashion," it is ripe for review. *Catholic Social Services,* 113 S.Ct. at 2496. "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation *or enforcement.*" *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)[17] (emphasis added). That the nature, or even the fact, of government enforcement actions was uncertain did not diminish the sufficiency of the harm imposed on the party seeking review. Once the party's conduct had been molded by the choice between compliance and risking government enforcement, harm sufficient to satisfy the second prong had been demonstrated. *Id.*

Abbott, a case which never questioned that review of an enforced order was ripe and expanded the circumstances for *pre*-enforcement review, is now, ironically, the basis for holding that courts should not review the merits of an enforced order. The danger of not correcting the lower courts' error is the creation of an unwarranted barrier to judicial review of administrative restraints on the exercise of First Amendment rights.

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[17] Stated conversely, review of a rule may not be ripe when "no irremediable adverse consequences flow from requiring a later challenge to [the] regulation. . . ." *Toilet Goods Assn.*, 387 U.S. at 164, 87 S.Ct. at 1525. The Court has found that controversies were not ripe when "adverse consequences" of a rule did not occur. *See Catholic Social Services,* 113 S.Ct. 2485; *National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177.

5. *The Lower Courts Erred in Relying on Beach.* The courts below relied upon the D.C. Circuit's holding in *Beach I* that the *Beach* plaintiffs' First Amendments claims were not ripe. The lower courts' reliance was misplaced.[18]

Beach is a typical pre-enforcement case. The *Beach* petitioners were four separate satellite master antenna television system ("SMATV") operators located in various parts of the country who brought a purely facial challenge to the FCC definitional order interpreting the Common Ownership Requirement. None of the *Beach* petitioners had been subject to an attempt by a state or locality to enforce the Common Ownership Requirement.

In contrast to *Beach*, this case was commenced by Liberty after the issuance of the administrative injunction had prevented it from engaging in speech and press activity. In addition, Liberty was and is being compelled to seek a franchise from the City of New York, which is bound by federal, state and local law to include a number of very specific burdens in any cable television franchise that it issues. These burdens are discussed *supra* at 9, n.11. App., *infra,* A-139-46; A-184-87. Thus, the peculiar, local facts that the D.C. Circuit could not determine in *Beach I* are well known here.

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[18] The district court's reliance on *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), is wholly misplaced. *Preferred Communications* was not a ripeness case and did not involve any ripeness analysis by the Ninth Circuit or this Court. Rather, the Ninth Circuit actually invalidated the challenged City ordinance -- an exclusive franchise provision -- as violative of the plaintiff's First Amendment right to provide cable television service to subscribers. 754 F.2d 1396 (9th Cir. 1985). The Supreme Court affirmed the Ninth Circuit's holding on narrower grounds and remanded the case for further factual development regarding the feasibility of making a second franchise available to *Preferred.* On appeal after remand, the Ninth Circuit merely sought additional fact finding on the effect of the issuance of a second franchise to plaintiff before ruling on the constitutionality of the City's action. *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1994), *cert. denied*, __U.S.__, 114 S.Ct. 2738, 129 L.Ed.2d 859 (1994).

Moreover, the extensive burdens that the New York City franchise must impose upon Liberty obviates the *Beach I* court's concern that, "a locality could adopt a summary process for franchising every external, quasi-private SMATV facility, and local SMATV operators could discharge their Sec. 621(b)(1) obligation by complying with this process," and that "[s]uch a franchising regime would pose very different First Amendment problems than a costly exclusive-franchising system." 959 F.2d at 984.

Far from supporting the lower court decisions, *Beach* underscores that the decisions below threaten fundamental constitutional values and conflict with decisions of this Court and other courts of appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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